No. 15,480

IN THE

United States Court of Appeals

For the Ninth Circuit

J. C. MILLETT Co., a corporation doing business as Key Distributing Co.,
Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

JURISDICTION.

This action was originally commenced by plaintiff-appellant by the filing of a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco (R. 3-13). The action was removed to the United States District Court for the Northern District of California, Southern Division upon the petition of defendant-appellee, pursuant to the provisions of Title 28, United States Code, Section 1441 (a) (28 U.S.C.A. Section 1441 (a)). The United

States District Court had original jurisdiction of this action pursuant to the provisions of Title 28, United States Code, Section 1332 (a) (1) (28 U.S.C.A. Section 1332 (a) (1)), as the pleadings and the petition for removal disclosed that the matter in controversy exceeded the sum of $3000.00 exclusive of interest and costs, and was between citizens of different states (R. 39).

After answer by the defendant (R. 13-27), trial was regularly had before the District Court sitting without jury (R. 50-157). On January 31, 1957, the District Court signed and filed its findings of fact, conclusions of law, and judgment in favor of defendant-appellee and against the plaintiff-appellant (R. 38-44).

The jurisdiction of this Court has been invoked under the provisions of Title 28, United States Code, Sections 1291 and 1294 (28 U.S.C.A. Sections 1291 and 1294), by the filing on February 7, 1957, of a notice of appeal from the judgment of the District Court (R. 44).

II.

STATEMENT OF THE CASE.

Plaintiff, a wholesaler of alcoholic beverages within the State of California, and defendant's predecessor in interest, Calvert Distillers Corporation (hereinafter called Calvert), a distilled spirits manufacturer's agent, entered into a written contract on March 14, 1952 (Plaintiff's Exhibit 1). Under the provisions of the contract plaintiff was appointed as a distributor of

certain alcoholic beverages within the counties of Alameda and Contra Costa in the State of California. The contract term was the period March 14, 1952 to December 31, 1952. The contract contained among others the following four provisions:

> "5. Calvert agrees to supply its products to Distributor to the best of Calvert's ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract."
>
> "11. This contract shall be effective for a period of ten months from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952."
>
> "15. This agreement shall be interpreted under the laws of the State of California."
>
> "16. This agreement represents the entire agreement between the parties and cannot be modified except in writing duly executed by both parties."

In plaintiff's action, which was instituted in the State Superior Court, it sought damages for breach of an alleged implied condition of said written contract and damages for alleged breaches of certain provisions of said contract.

Plaintiff's first cause of action charged that Calvert had breached an implied condition of said contract, namely, that it would continue to employ salesmen for the purpose of soliciting orders for alcoholic beverages from retailers located in Alameda and Contra Costa counties and that all orders so solicited would be submitted to plaintiff for delivery. The breach alleged was that Calvert had continued to employ salesmen and that said salesmen had solicited orders for Calvert products from retailers located in Alameda and Contra Costa counties, but that from and after March 14, 1952, Calvert had refused to submit all such orders to plaintiff for delivery and had submitted a substantial portion of said orders to its other competing distributors for delivery (R. 6-8).

Plaintiff's second cause of action charged that plaintiff during the contract term placed an order with Calvert for 900 cases of Calvert products and that Calvert breached said contract by refusing to fill said order (R. 9).

Plaintiff's third cause of action charged that the contract contained a renewal provision exercisable at the sole and exclusive option of plaintiff. The breach alleged was that plaintiff had given Calvert notice of its election to exercise said option and to renew said contract, but that Calvert had refused to renew the contract (R. 10-12).

Defendant's answer to the charging allegations of plaintiff's first cause of action set forth a general denial of said allegations (R. 16). In addition, defendant

set up the special defense that the alleged condition pleaded in plaintiff's first cause of action was illegal, null and void, because it is unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California at retail and/or from unlicensed persons under the provisions of sections 23000 et seq. of the Business and Professions Code of the State of California (R. 17).

Defendant, in its answer to plaintiff's second cause of action, admitted that plaintiff placed the order referred to therein and that defendant did not ship or deliver the merchandise ordered or any portion thereof (R. 18), but set up special defenses based on the provisions of paragraphs 5 and 12 of the contract and on the illegality of the contract as pleaded (R. 18-21).

Defendant, in its answer to plaintiff's third cause of action, denied that provision 11 of the contract was intended by the parties to give plaintiff the sole and exclusive option to renew the contract, denied that plaintiff had the right to elect to renew the contract and denied that plaintiff had the right to renew the contract (R. 23-24). In addition, defendant alleged by way of special defenses that paragraph 11 did not confer and was not intended by the parties to confer upon plaintiff the right to renew said agreement and that the contract as pleaded was illegal (R. 25-26).

After a trial of the factual issues the trial Court made the following findings of fact on the issues raised by the pleadings:

(a) First Cause of Action

(1) "That the allegations contained in paragraph IX of the first cause of action of plaintiff's complaint are, and each of them is, untrue." (R. 39-Finding IV).

(2) "That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's first cause of action are, and each of them is, true." (R. 40-Finding V).

(b) Second Cause of Action

(1) "That it is untrue that Calvert Distillers Corporation did not have a lawful reason for not shipping to plaintiff the products requested in its order dated December 15, 1952." (R. 40-Finding VIII).

(2) "That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's second alleged cause of action are, and each of them is, true." (R. 40-Finding IX).

(c) Third Cause of Action

"It is untrue that the provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, were intended by the parties to mean that in the event the said agreement was then in full force and effect and Key Distributing Co. desired to renew the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving Calvert Distillers Corporation not less than 30 days' notice of such intention prior to December 31, 1952. (R. 41-Finding XI).

From the foregoing findings of fact the trial Court concluded:

(a) "The contract made and entered into by Calvert Distillers Corporation and plaintiff on March 14, 1952, . . . was not breached by Calvert Distillers Corporation in any respect." (R. 41-Conclusion of Law I).

(b) "The contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, terminated by its terms on December 31, 1952." (R. 42-Conclusion of Law II).

(c) "The provisions of paragraph 11 of the contract . . . did not give plaintiff an option to renew said contract." (R. 42-Conclusion of Law III).

(d) "The contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void." (R. 42-Conclusion of Law IV).

The final conclusion was that plaintiff take nothing by the action (R. 42-Conclusion of Law V).

III.

ARGUMENT.

A. FIRST CAUSE OF ACTION.

Plaintiff in its first cause of action charged defendant with breach of a specific obligation, namely, that Calvert had refused to submit to plaintiff for delivery all orders solicited by its salesmen from retailers located in Alameda and Contra Costa counties. As such an obligation was nowhere to be found in the contract

between Calvert and plaintiff dated March 14, 1952 (Plt. Ex. No. 1), plaintiff, in a devious attempt to circumvent the California parole evidence rule (Section 1856 of the Code of Civil Procedure) and paragraph 16 of the contract which provides that it represents the entire agreement of the parties and cannot be modified except in writing duly executed by the parties, argues that the alleged obligation was a part of the promotional obligation imposed on Calvert by paragraph 6 of the contract. Plaintiff further argues that under California law it had the right to introduce evidence for the purpose of defining Calvert's promotional obligation and the scope and meaning of the words "to promote" as used in the contract. Even if plaintiff's argument be accepted in toto, plaintiff has not demonstrated that the trial Court erred in denying it relief on its first cause of action. Plaintiff has not shown and cannot show that the record contains evidence which would support a finding that the words "to promote" imposed a duty on Calvert to have its salesmen solicit orders from retailers of alcoholic beverages located in Alameda and Contra Costa counties and submit all such orders to plaintiff for delivery. Although plaintiff in the section of its brief devoted to its first cause of action states that it is normal in the alcoholic beverage industry for sales representatives of distillers and their agents to call upon retailers for the purpose of soliciting orders for their distributors, the record in this case is devoid of evidence of any such custom. From an examination of footnote 8 which appears on page 44 of appellant's opening brief, it is

apparent why plaintiff did not and could not produce evidence that it is the custom of the alcoholic beverage industry for representatives of distillers and their agents to solicit orders from retailers and submit them to any one distributor for delivery, for as such footnote points out such a custom would violate both state and federal statutes proscribing discriminatory treatment of wholesalers similarly situated. Moreover, as will be discussed in the concluding section of this brief the mere solicitation of orders from retailers by representatives of distillers and their agents is illegal under the provisions of the Alcoholic Beverage Control Act of the State of California.

It is respectfully submitted that as the record in this case contains no evidence that Calvert, as alleged in plaintiff's first cause of action, obligated itself to cause its salesmen to solicit orders from retailers located in Alameda and Contra Costa counties and submit all such orders to plaintiff for delivery, the trial Court correctly ruled in denying plaintiff relief on its first cause of action, which relief was sought by reason of an alleged breach of said obligation.

B. SECOND CAUSE OF ACTION.

Paragraph V of the contract between Calvert and plaintiff provides in part as follows:

> ". . . Calvert reserves the right not to ship any orders received where such orders would result in

> an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract."

Defendant in its second separate defense to plaintiff's second cause of action quoted this paragraph and alleged that the order referred to in the second cause of action was not shipped to plaintiff because the order would have resulted in an inventory of defendant's products in the hands of plaintiff greater than a 45-day inventory, based on the rate of sales of defendant's products by plaintiff for the six months prior to the date of the contract between the parties dated March 14, 1952 (R. 19-20). In support of this defense defendant introduced into evidence its answer to Interrogatory No. 21 propounded it by the plaintiff in this action (R. 29-30; R. 100). This answer established that plaintiff's order of December 15, 1952, if filled by defendant, would have resulted in an inventory of the products ordered in the hands of plaintiff greater than a 45-day inventory based on the rate of sales of said products by plaintiff for the six months prior to the date of the contract between the parties (R. 100). Based on this evidence the trial Court found that plaintiff's allegation that defendant failed to ship said order without lawful reason therefore was untrue (R. 40), and concluded that defendant had not breached the contract by failing to ship said order (R. 41).

Plaintiff claims that the trial Court's finding and conclusion are erroneous for the following reasons:

(a) It was not averred that the order was rejected because it would have resulted in "an excessive inventory" as described in paragraph 5 of the contract.

In answer defendant can only direct the Court's attention to its second defense to the second cause of action where it is specifically alleged that the order was not shipped because it would have resulted in "an excessive inventory" (R. 19).

(b) There was no showing that defendant's refusal to ship the order was stated to have been made upon the ground that it would have resulted in "an excessive inventory".

In answer defendant can only direct the Court's attention to the provisions of paragraph 5 of the contract which gave defendant the unqualified right to refuse shipment of any order which would have resulted in "an excessive inventory" and imposed no obligation on defendant to notify plaintiff that any particular order was being rejected for said reason.

(c) There was no showing as to the date of arrival of the ordered merchandise or of the inventory on the date when it would have been delivered.

Defendant submits that such a showing was not necessary to sustain its special defense for it is manifest from a reading of the provisions of paragraph 5 of the contract that the inventory used by defendant in determining whether any particular order would result in "an excessive inventory" would be the inventory existing as of the date of the order. This must follow because of the fact that the determination of

whether any particular order would result in "an excessive inventory" was to be based on plaintiff's rate of sales for the six months prior to the date of the March 14, 1952 contract and not on plaintiff's actual sales for any particular period during the term of the contract. Inasmuch as the determination of whether any particular order would result in "an excessive inventory" had to be made prior to the shipment of the order, provision 5 could operate in no other manner because prior to the shipment of the order defendant would have no way of knowing what plaintiff's sales would be during the period between the date of receipt of the order and the date the merchandise ordered was delivered.

(d) Defendant's showing ignored the fact of common knowledge that the sales of alcoholic beverages during the month of December exceeds the rate of sales in any other period during the year.

Here again defendant submits that plaintiff's actual sales during any particular period are not relevant, for the reason that the determination of whether any particular order would result in "an excessive inventory" was to be based on plaintiff's rate of sales during the six month period preceding the date of the contract.

(e) Defendant did not act upon any such excuse for not shipping said order in the Court below.

In answer defendant directs the Court's attention to page 99 of the record where the following appears:

> "Mr. Ehrlich. This shows the plaintiff's sales to retailers September, 1951, to February, 1952, that

is, the preceding six months, which permits us to, we contend, reject your order on the basis of the average 45-day inventory."

Defendant respectfully submits that the record clearly supports the trial Court's finding that plaintiff's allegation that defendant failed to ship said order without lawful reason therefor was untrue and its conclusion that defendant did not breach the contract between the parties by failing to ship said order. It is clear from the record that plaintiff's order of December 15, 1952, would have resulted in "an excessive inventory" in plaintiff's hands within the meaning of the provisions of paragraph 5 of the contract, and that accordingly as determined by the trial Court defendant had legal justification for refusing to fill said order.

C. THIRD CAUSE OF ACTION.

It is apparent from a reading of appellant's opening brief that both plaintiff and defendant are in agreement that the question of whether paragraph 11 of the contract gave plaintiff an option to renew the contract, depends solely on the resolution of a question of law. Although the trial Court correctly found in finding XI that it was untrue that the parties intended by the provisions of paragraph 11 to give plaintiff an option to renew the contract inasmuch as plaintiff introduced no evidence to support this allegation, defendant submits that the crucial question to be decided by this Court is whether the trial Court was correct in deciding as a matter of law that "The provi-

sions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, did not give plaintiff an option to renew said contract." (R. 42).

Although plaintiff attempts to make much of defendant's admission that plaintiff interpreted the contract as conferring upon it the right of renewal, which admission was occasioned by the language used in plaintiff's letter to Calvert dated November 18, 1952 (Plt. Ex. No. 3), it is clear from the language of said letter that Calvert prior to the date of the letter had taken the position that plaintiff had no such right.

Moreover as neither plaintiff nor defendant introduced any evidence as to what was intended by the parties by paragraph 11 and as no evidence of intention could have been introduced because the provision is neither uncertain nor ambiguous (Code of Civil Procedure, Sec. 1856), defendant submits that the question of whether paragraph 11 did or did not create an option to renew the contract can only be determined by an examination of the provisions of said paragraph. Paragraph 11 reads as follows:

> "This contract shall be effective for a period of 10 months from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952."

Defendant submits that it is clear that this provision created no contractual right to renew in plaintiff. The clause means what it says. It gave plaintiff no right or option to renew at plaintiff's election. The clause pro-

vides for notice in case a desire for renewal existed on the part of the plaintiff, but it contains no words of promise or undertaking on the part of defendant to renew on receipt of said notice. That words of promise or undertaking on the part of one contracting party are necessary in order to create a right in the other is well illustrated by the cases cited on pages 65-68 of appellant's opening brief. In every case cited therein it will be noted that the optionor expressly agreed to perform. For example:

> *Anderson v. Bills,* 335 Ill. 524, 167 N.E. 864, "Now, therefore, in consideration of the premises . . . *A hereby agrees to purchase* from B the above described land for ..... dollars at any time within five years from this date, provided notice is given by B to A on or before September 1st of any year that B desires A to take said lands . . ." (emphasis supplied).
>
> *Brooks v. Trustee Co.,* 76 Wash. 589, 136 P. 1152, ". . . *we hereby agree* that after you have consulted your sister or anyone else in regard to this investment you desire to withdraw your investment you may at any time return these bonds . . ." (emphasis supplied).
>
> *Carter v. Love,* 206 Ill. 310, 69 N.E. 85 ". . . Now, if the said M. G. Love shall at any time before the expiration of this option so desire, *I agree, in consideration of the sum of $9,240 to convey* to said M. G. Love, or as he shall direct, . . ." (emphasis supplied).
>
> *Bras v. Sheffield,* 49 Kan. 702, 31 P. 306 ". . . *And it is further covenanted and agreed by the said parties* that the said Charles Bras shall have

the right to purchase, if he so elect, at the stipulated sum of twelve hundered dollars, . . .'' (emphasis supplied).

Comstock Bros. v. North, 88 Miss. 754, 41 So. 374, ''. . . and if, at the expiration of the time or February 1st, 1904, you decide to take this land, *we will sell you eight-ninths . . .*'' (emphasis supplied).

Dawson v. Goff, 43 C. 2d 310, 273 P. 2d 1, ''. . . *The undersigned hereby agree to purchase from you* upon demand written or verbal . . . not to exceed forty thousand (40,000) common shares . . .'' (emphasis supplied).

The above examples clearly demonstrate that paragraph 11 created no contractual right in plaintiff, because it contains no words of promise or undertaking on the part of defendant.

The statement that if the distributor ''desires to renew . . . he shall so notify Calvert not less than 30 days before December 31, 1952'' was obviously designed to give defendant at least 30 days to find another distributor in the event plaintiff did not desire to continue. It was certainly not designed to give plaintiff an option to renew irrespective of defendant's wishes and irrespective of its performance under the contract.

Dealing with contract clauses somewhat similar to paragraph 11 and supporting defendant's contentions above referred to are the cases of *Gardella v. Greenburg,* 242 Mass. 405, 136 N.E. 106 and *Bernstein v. Smith,* 194 N.Y. Supp. 789.

In *Gardella v. Greenburg,* supra, the Court had the following provision before it for construction:

> "It is agreed that six months written notice before the termination of this lease shall be given by either of said parties to the other in event that either of said parties desire(s) a renewal of said lease, and failure to give said notice shall be regarded as an intention on the part of the parties failing to give the same that said lease shall not be renewed."

The lessee gave notice in which he claimed to exercise an option of renewal. The lessor replied she did not care to accept any offer of renewal. In ruling that the covenant construed did not entitle the lessee to a new lease, the Court stated:

> "The troublesome question is whether the quoted words create a contractural right in both parties. They provide for notice in case either desires to renew, and that the failure to give it shall be regarded as manifesting an intention to the contrary. Instead of declaring plainly and unmistakably that there should be a right to renew (Cloverdale Co. v. Littlefield, 240 Mass. 129, 133 N.E. 565), or such a privilege (Leavitt v. Maykel, supra), or a privilege and right (Ferguson v. Jackson, 180 Mass. 557, 62 N.E. 965), or the refusal of a definite extension (Tracy v. Albany Exch. Co., 7 N.Y. 472, 57 Am. Dec. 538), *the covenant provided for notice in case a desire for a renewal existed on the part of either lessor or lessee. A desire to have a lease is not equivalent to a right thereto.* Not only is provision made for the manifestation of this wish, but it is declared with equal definiteness that the failure to give notice

> shall be 'regarded as an intention' that the lease shall not be renewed. The negative intent manifested by failure to give notice is on an equal footing with the desire declared by giving one. One provision is as strong as the other. *Construing them together, we think that the true interpretation of the covenant is that it furnished a timely means of information whether the parties were willing to execute another lease on the same terms.* There are no words indicating a right in the lessor to bind the lessee beyond the expiration of the term, or to obligate the lessor in like manner. The covenant did not create an absolute and unqualified right in either." (Emphasis supplied).

In *Bernstein v. Smith,* 194 N.Y. Supp. 789, affirmed without opinion in 198 N.Y. Supp. 901, the Court held that no right of renewal was given by a provision in a lease that "the tenant hereby expressly agrees to give formal written notice to the landlord of tenant's wish as to continuance of the tenancy beyond the term hereby granted." In so holding, the Court stated:

> "While we agree in the view that the court should endeavor to give effect to every stipulation of an agreement, there is a limit beyond which contractual intention cannot be read into language which does not express it, either in words or by reasonable implication. It is conceivable that the landlord of such premises would desire to know, several months in advance of the end of the term, whether the tenant intends to stay for another year, and make arrangements accordingly, and there seems no room for doubt that it is just what the language quoted means—an agreement on the part of the tenant to express in writing, on or be-

fore January 15, whether he wishes to renew his lease . . .''

Defendant submits that paragraph 11 of the contract created no contractual right in plaintiff, and that the trial Court's decision so holding must be affirmed. The provision contains no words of promise or undertaking on the part of defendant to renew on receipt of notice that plaintiff desired to renew. The provision does not provide that plaintiff had the right to renew or the privilege of renewing, but only provides for notice in case a desire for renewal existed and paraphrasing the Court in *Gardella v. Greenburg*, supra; ''A desire to have a contract is not equivalent to a right thereto''.

Moreover, it is well settled that a renewal provision such as is before the Court must be construed strongly in favor of the grantor (*Pyrate Corporation v. Sorenson* (C.C.A., 9th—1930), 44 F. 2d 323; Williston on Contracts, sec. 620).

In closing this section of its brief defendant desires to point out that appellant in its opening brief claims the benefit of certain canons of construction, namely, (1) that in case of doubt the Court will follow the construction placed upon the contract by the parties, (2) that in case of doubt the Court will construe the words of the contract most strongly against the party who used them in the preparation of the contract and (3) that the renewal provision must be construed as having been intended to mean something and that ''something'' is to be determined in the light of the under-

standing of the ordinary person. Defendant submits that canons (1) and (2) are not applicable on the facts of this case because there is no doubt as to what paragraph 11 means. Defendant agrees with canon (3) and submits that paragraph 11 means what it says, "that if the distributor desires to renew he shall so notify Calvert" and not as contended by plaintiff that plaintiff shall have the unilateral right to renew the contract.

Defendant has no quarrel with the remaining portion of appellant's brief devoted to its third cause of action. Defendant agrees that irrevocable offers may be addressed to the desire, wish, election and choice of the offeree and that a contract comes into being upon the communication of the acceptance of an offer. However, defendant fails to see how these abstract propositions of law aid plaintiff's position. Defendant submits that the only question to be decided is whether the trial Court was correct in its decision that the provisions of paragraph 11 of the contract did not give plaintiff an option to renew the contract, and further submits that said question must be answered in the affirmative based on the literal wording of paragraph 11.

IV.

DEFENDANT'S SPECIAL DEFENSE OF ILLEGALITY.

Defendant set up as a special defense to each cause of action of plaintiff's complaint that the contract as pleaded in plaintiff's complaint was illegal, null and void. This defense was based on the fact that plaintiff

had pleaded that one of the conditions of the written agreement was that Calvert agreed to promote the sale of its products by causing its salesmen to solicit orders from retailers and submit the same to plaintiff for delivery, and that such an agreement violated the provisions of the Alcoholic Beverage Control Act which made it unlawful for Calvert under the licenses which it held in the State of California to solicit or obtain orders for alcoholic beverages from retailers.

Although plaintiff throughout its brief takes the position that the trial Court resolved this action in favor of defendant because it found that defendant had established its special defense of illegality, it is clear that such is not the case because the trial Court found that defendant had not agreed to perform the acts on which its defense of illegality was based (R. 39—Finding IV). Therefore the question of whether the contract as pleaded in plaintiff's complaint is illegal is not before this Court.

However, as plaintiff has seen fit to argue the question in its brief, defendant feels that it is constrained to answer said argument.

In paragraph V of plaintiff's complaint (R. 5), plaintiff alleges that defendant is not authorized by its California licenses to enter into, or conduct, or participate in, any transaction respecting alcoholic beverages and, more particularly, a sale thereof as defined in the Alcoholic Beverage Control Act of the State of California with persons licensed to sell alcoholic beverages at retail to unlicensed persons. Defendant in its answer admitted said allegation (R. 14).

The Alcoholic Beverage Control Act defines the words sell, sale and to sell as follows:

> " 'Sell' or 'sale' and 'to sell' includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages *and soliciting or receiving an order for such beverages, . . .*" (Business and Professions Code, Sec. 23025) (Emphasis supplied).

In paragraphs VII and IX of its first cause of action (R. 6-8), plaintiff alleges that defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa for the purpose of soliciting orders and sales for defendant's products from others than wholesalers, manufacturers and rectifiers and submitting said orders to plaintiff for delivery.

If paragraphs V, VII and IX of plaintiff's first cause of action are read together we find that plaintiff has pleaded that as a part of the consideration for its promise to purchase defendant's products, defendant agreed to cause its salesmen to solicit orders from retailers of alcoholic beverages in violation of the Alcoholic Beverage Control Act of the State of California (Business and Professions Code, sec. 23366).

If defendant had so agreed, defendant submits that plaintiff would not have been entitled to recover in this action for the reason that it was seeking recovery for breaches of an illegal contract.

In this connection section 1667 of the Civil Code of the State of California provides:

"That is not lawful which is:

1. Contrary to an express provision of law;

2. Contrary to the policy of express law, though not expressly prohibited; or

3. Otherwise contrary to good morals."

It is well settled that a valid contract cannot be founded on an illegal consideration.

King v. Johnson, 30 C.A. 63;
Losson v. Blodgett, 1 C.A. 2d 13;
Asher v. Johnson, 26 C.A. 2d 403.

It is further well settled that if any part of several considerations for a single object is unlawful, the entire contract is void.

Civil Code, sec. 1608;
Fewel & Dawes v. Pratt, 17 C. 2d 85;
Conte v. Busby, 115 C.A. 732.

Defendant respectfully submits as it could not legally under the licenses it holds in the state of California solicit orders from retailers, that if it had agreed to do so as alleged by plaintiff the contract between Calvert and plaintiff being based on an illegal consideration would have been void under the authorities set forth above.

Plaintiff in its brief contends that section 23773 of the Business and Professions Code which reads as follows:

"The provisions of sections 23771 and 23772 do not prevent agents or employees of a distilled

> spirits manufacturer located without this State from soliciting orders for distilled spirits within the State."

specifically exempts from all restrictions the practice defendant claims is illegal, to-wit, soliciting orders from retailers.

Plaintiff here attempts to practice a deception on this Court for it is clear that section 23773 does not authorize holders of manufacturer's agent's licenses in California to solicit orders from retailers.

It is obvious that the section was designed so as to allow out of State manufacturers holding interests in California wholesaler's, rectifier's or retailer's licenses to promote the sale of their products in California even though section 23772 would prevent them from obtaining a license and that the section was inserted by the legislature to eliminate the possibility that sections 23771 and 23772 would be held unconstitutional on the ground they created an undue burden on interstate commerce. The so-called official interpretation of section 23773 set forth on page 45 of appellant's opening brief is clearly not an interpretation of said section but is merely a definition of the rights of holders of manufacturers' agents' licenses in California. Moreover, defendant fails to see any language in said "official interpretation" which authorizes solicitation of orders from retailers. If promotional representatives of manufacturers' agents are not allowed to receive signed orders from the retail trade as stated in said "official interpretation," it is clear that Calvert was not authorized by its man-

ufacturer's agent's license to cause its salesmen to solicit orders from retailers and submit them to plaintiff for delivery. This must follow for Calvert could not submit an order to plaintiff for delivery until it had first been obtained from the retailer and the so-called official interpretation states that this is not authorized.

Defendant again respectfully submits that if it had agreed to solicit orders from retailers as alleged by plaintiff, the contract between Calvert and plaintiff being based on an illegal consideration would have been void and plaintiff would have been entitled to no relief in this action.

V.

CONCLUSION.

Defendant respectfully submits that the trial Court committed no error in this proceeding and that the judgment should be affirmed.

Dated, San Francisco, California,
July 22, 1957.

Respectfully submitted,
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